No. 89-1618

In the Supreme Court of the United States

OCTOBER TERM, 1989

BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, D/B/A STATION KKHI, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 891 F.2d 230. The decision and order of the National Labor Relations Board (Pet. App. A18-A34) are reported at 284 N.L.R.B. 1339.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1989. A petition for rehearing was denied on February 14, 1990 (Pet. App. A17). The petition for a writ of certiorari was filed on April 16, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates radio station KKHI in San Francisco. For many years it has had a collective bargaining rela-

tionship with the National Association of Broadcast Employees and Technicians (NABET), representing the company's engineering and technical employees, and the American Federation of Radio and Television Artists (AFTRA), representing the company's broadcast announcers. The last contract between petitioner and NABET expired on February 1, 1978. Negotiations for a new contract failed after petitioner proposed to assign both broadcasting and engineering duties to on-air announcers. On November 12, 1979, petitioner's five technicians and engineers went on strike. Pet. App. A4, A18.

Petitioner thereafter hired five permanent replacements for the striking engineers and implemented its new operating scheme. On October 30, 1980, after securing a favorable ruling from the AFL-CIO in its jurisdictional dispute with AFTRA, NABET contacted petitioner and requested further negotiations in light of "changed circumstances." One week later, on November 6, 1980, petitioner withdrew recognition from NABET, contending that the union no longer represented a majority of the engineering and technical employees. Pet. App. A19.

2. Acting on charges filed by NABET, the Board found that, by withdrawing recognition from NABET and refusing to bargain, petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. A18-A34. The Board rejected petitioner's contention that it had a reasonable, good-faith doubt of NABET's majority status at the time it withdrew recognition from the union. In reaching that judgment, the Board held that it would make no presumption concerning the extent to which striker replacements support the union. *Id.* at A21-A33. Noting that the courts of appeals had "uniformly rejected" its prior position (*id.* at A29) – that permanent replacements are presumed to support the union in the same ratio as the striking employees whom they replaced – the

Board "carefully reviewed [its] past decisions and assessed [its] experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status." *Id.* at A31. The Board concluded that no such "universal" generalizations could be drawn. It therefore resolved to "review the facts of each case" and "require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status." *Id.* at A33.

Applying that principle, the Board found that petitioner had not established a sufficient good-faith basis for withdrawing recognition from NABET. The Board explained (Pet. App. A33):

> The only factor presented by [petitioner] is the hiring of five permanent replacements at a time when there were only three remaining strikers. This fact, by itself, is insufficient to establish a good-faith doubt. Nor can we ascertain the replacements' union sentiments either from their having crossed a peaceful and sporadic picket line or from the Union's failure to contact the replacements during the strike. Rather, more evidence would be required to support a good-faith doubt, as these events, common to the hiring o[f] replacements, do not adequately demonstrate the replacements' union sentiments.

The Board ordered petitioner to cease and desist from withholding recognition from NABET and from refusing to bargain with the union. Pet. App. A34; 284 N.L.R.B. at 1345, 1347.

3. The court of appeals enforced the Board's order. Pet. App. A1-A12. The court first held that the Board did not

err in applying its new no-presumption rule in petitioner's case. Rejecting petitioner's contention that the rule should not be applied retroactively, the court explained that "the Board's new standard * * * work[ed] to [petitioner's] advantage by abolishing the presumption of proportionality in striker replacements." *Id.* at A9. The court also upheld the imposition of a bargaining order, notwithstanding "the passage of time and employee turnover in th[is] case." *Id.* at A10.

ARGUMENT

Petitioner asks (Pet. 5) this Court to review the Board's no-presumption rule, according to which the Board makes no presumption concerning the union sentiments of striker replacements. In *NLRB* v. *Curtin Matheson Scientific, Inc.*, No. 88-1685 (Apr. 17, 1990), this Court upheld the Board's rule, both as an empirical matter and as a matter of sound labor policy. As petitioner freely concedes (Pet. i n.*, 5), the decision in *Curtin Matheson* is dispositive. Indeed, the Court's opinion in *Curtin Matheson* makes clear (slip op. 5) that the no-presumption rule at issue in that case was first articulated in the present case. Since petitioner raises no other issues, the petition should be denied.*

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* Although petitioner states one additional question—whether "imposition of the 'bargaining order' remedy rather than a 'directed election' deprives the permanent striker replacement work force [of] the self determination rights guaranteed them in the National Labor Relations Act" (Pet. i)—the petition does not address that issue at all. Indeed, notwithstanding the articulation of that additional question, petitioner states that "[t]he questions presented by this case are essentially those" in *Curtin Matheson*, and it acknowledges that the petition "does not seek independent relief" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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